FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 16 1950
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1950

No. 419

LINUS PAULING, *Petitioner*,

v.

JAMES O. EASTLAND, THOMAS J. DODD, OLIVER GASCH, and JOSEPH C. DUKE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

A. L. WIRIN,
FRED OKRAND,
257 South Spring Street,
Los Angeles 12, California,
Attorneys for Petitioner.

PHILLIPS, ACKER & MORRIS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for the Allowance of the Writ and Argument Amplifying Same	5,
Argument	7
I. The Order *Duces Tecum* Offends Freedom of Speech, Freedom of the Press, Freedom of Assembly and the Right to Conscience, as Guaranteed by the First Amendment to the Constitution of the United States	7
II. There Was No Probable Cause for the Issuance of the Order *Duces Tecum*. Accordingly, It Violates Rights Guaranteed by the Fourth Amendment and Constitutes an Unreasonable Search and Seizure	9
III. The Order *Duces Tecum* is Not Pertinent to Any Matter Within the Committee's Authority and is Beyond Its Jurisdiction	10
IV. The Petitioner Has Standing to Sue; the Complaint States a Present Justiciable Controversy, Which is Ripe for Adjudication	10
(A) Analysis of Chief Judge Prettyman's Statement	14
V. The Petitioner Has Standing to Sue the Respondent Joseph C. Duke as Sergeant-at-Arms of the Senate	18

Page

VI. The Petitioner Has Standing to Sue the Respondent Oliver Gasch as United States Attorney 19

Appendix "A" 1a

Appendix "B" 2a

Appendix "C" 8a

TABLE OF AUTHORITIES

CASES:

Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227 . . 10, 14
Attorney General for the Commonwealth of Australia v. *Colonial Sugar Refining Co.*, Engl. L. R. 1914 A.C. 237 17
Barenblatt v. *United States*, 360 U.S. 109 . . . . 6, 10, 12, 16
Bates v. *City of Little Rock*, 361 U.S. 516 5
Bell v. *Hood*, 372 U.S. 678 19
Braden v. *United States*, 362 U.S. 960, certiorari granted, No. 54 this Term 6, 11, 12
Brownell v. *Tom We Shung*, 352 U.S. 180 ..... 12, 18
Carr v. *Young*, 363 U.S. 826 5
Dayton v. *Dulles*, 357 U.S. 144 16
Deutsch v. *United States*, certiorari granted, No. 233 this Term 6
Evers v. *Dwyer*, 358 U.S. 202 ..... 12, 18
Federal Communications Comm. v. *American Tobacco Co.*, 264 U.S. 298 9
Federation of Labor v. *McAdory*, 325 U.S. 450 14
Fishler v. *McCarthy*, 117 F. Supp. 643, 218 F. 2d 164 15
Gojak v. *United States*, Misc. No. 313 this Term, certiorari granted 6
Greenfield v. *Russell*, 292 Ill. 392 17
Henry v. *United States*, 361 U.S. 98 10
Interstate Commerce Comm. v. *Brimson*, 154 U.S. 447 9
Joint Anti-Fascist Refugee Comm. v. *McGrath*, 341 U.S. 123 ..... 9, 10, 13, 16
Jones v. *Securities & Exchange Comm.*, 298 U.S. 1 . . 9
Jurney v. *McCracken*, 294 U.S. 125 ..... 10, 16

Page

OTHER AUTHORITIES:

Borchard, *Declaratory Judgments*, 2d Ed., "Special Purposes and Advantages" 13

STATUTES:

2 U.S. Code Section 192 ..... 7, 10, 11
2 U.S. Code Section 194 19
28 U.S. Code 1254 (1) [62 Stat. 928] 2
28 U.S. Code 2201 11
Rule 57, Federal Rules of Civil Procedure 11

Constitutional Provisions:

First Amendment to Constitution of the United States 2, 5
Fourth Amendment to Constitution of the United States 2, 6

Page

Kilbourn v. *Thompson*, 103 U.S. 186 18
Knowles v. *United States*, (C.A.D.C., No. 13,734, decided June 18, 1960) 8
LaCrosse Tel. Corp. v. *Wisconsin Emp. Rel. Board*, 336 U.S. 18 13
Lawson v. *United States*, 176 F. 2d 49 11
Liveright v. *United States*, certiorari granted, No. 328 this Term 6
Luscomb v. *Bowker*, 334 Mass. 468 17
McGrath v. *Kirstenson*, 340 U.S. 162 12
McPhaul v. *United States*, 362 U.S. 917, certiorari granted; Nov. 33 this Term 6, 11, 12
Mins. v. *McCarthy*, 209 F. 2d 307 15
N.A.A.C.P. v. *Alabama*, 357 U.S. 449 ..... 5, 8
Perkins v. *Elg*, 307 U.S. 325 ..... 12, 16
Peters v. *Hobby*, 349 U.S. 331 16
Philadelphia Co. v. *Stimson*, 223 U.S. 605 16
Price v. *United States*, certiorari granted, No. 331 this Term 6, 8
Public Service Comm. v. *Wycoff Co.*, 344 U.S. 237 .. 10
Russell v. *United States*, certiorari granted, No. 239 this Term 6
Santa Fe Pacific R.R. Co. v. *Lane*, 244 U.S. 492 12
Shelton v. *Tucker*, 362 U.S. 958 5
Shelton v. *United States*, certiorari granted, No. 246 this Term 6
Shields v. *Utah, Idaho Central R.R. Co.*, 305 U.S. 177 19
Sinclair v. *United States*, 279 U.S. 263 11
Sweezy v. *New Hampshire*, 354 U.S. 234 9
Talley v. *California*, 362 U.S. 60 ..... 5, 8
United States v. *Kamin*, 135 F. Supp. 382 9
United States v. *Owlett*, 15 F. Supp. 736 16
United States v. *Rumely*, 344 U.S. 41 7
Watkins v. *United States*, 354 U.S. 178 ..... 6, 11
Whitman v. *United States*, certiorari granted, No. 300 this Term 6
Wilkinson v. *United States*, 362 U.S. 926, certiorari granted, No. 37 this Term 6, 11, 12
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 16

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No.

LINUS PAULING, *Petitioner*,

v.

JAMES O. EASTLAND, THOMAS J. DODD, OLIVER GASCH, and JOSEPH C. DUKE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

The petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit, which affirmed an order of the U. S. District Court for the District of Columbia dismissing the petitioner's complaint.

OPINIONS BELOW.

The order of the District Court dismissing the complaint was made on August 23, 1960. It is unreported. The Court of Appeals for the District of Columbia Circuit affirmed the order on September 6, 1960. It is unreported. A copy of

that order is attached hereto as Appendix A. Chief Judge Prettyman made a statement of his views on September 7, 1960; it is set forth as Appendix B.

JURISDICTION.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254(1) [62 Stat. 928].

QUESTION PRESENTED.

Does a complaint, filed in a U. S. District Court, state a cause of action for declaratory and other relief which alleges an order by the Senate Subcommittee on Internal Security[1] made after overruling objection thereto, requiring the petitioner, a witness then appearing before the Committee under compulsory process, to identify the distributors of a petition to the United Nations, urging an international agreement to halt further nuclear weapons tests by all nations, where the complaint recites that the petitioner's ground for refusal to submit such names is fear of reprisals upon those identified, and where the complaint further alleges that reprisals in the form of harassment and loss of employment would in fact result from such identification?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. First Amendment to Constitution of the United States;

2. Fourth Amendment to Constitution of the United States;

3. The Federal Declaratory Judgment Act.

These will be set forth in Appendix C, annexed hereto.

---

[1] Hereinafter, for purposes of convenience, we shall refer to the Senate Subcommittee on Internal Security as the Committee.

STATEMENT OF THE CASE.

The complaint names as defendants Senators Thomas J. Dodd and James O. Eastland, United States Attorney Oliver Gasch and Joseph C. Duke, Sergeant-at-Arms of the United States Senate.

The complaint sought a declaratory judgment adjudging as void and illegal an order made by the respondent Dodd on June 21, 1960, in behalf of the United States Senate Subcommittee on Internal Security, in the course of the hearing before the Committee, ordering and directing the appellant to reappear before the Committee

> "and bring with him all signatures and purported signatures to the petition presented by the plaintiff to the Secretary General of the United Nations, together with all letters of transmittal by which, or in connection with which, such signatures were transmitted to the plaintiff or received by him." (Complaint, ¶ IV, p. 3)

Incorporated in the Complaint and made part thereof (¶ IV of Complaint) is the official transcript of the hearing before the Subcommittee (in galley proof form). That transcript discloses:

1. That the petitioner answered all questions, fully and responsively, put to him by members of the Committee and its counsel;

2. That he agreed to comply with the first half of the order aforesaid (Committee Transcript of Hearing, p. 30), namely, to appear again before the Committee and bring with him the original signatures of over 11,000 persons who signed the petition to the United Nations;[2]

---

[2] The petitioner clarified his willingness to submit that information in a letter addressed to the Court of Appeals, which is part of the certified record transmitted by the Clerk of the Court of Appeals to the Clerk of this Court.

3. That, in context, the second half of the order of the Committee aforesaid, requires identification of the names of the individuals who circulated the petition (see Hearing, p. 23 et seq.); and

4. That the petitioner stated (ibid, p. 27) that he felt his responsibilities to the United States very deeply; and that he wanted to cooperate with the Committee in all respects consistent with his sense of conscience; that he was unable to comply with the request for names, because, as he stated,

> ". . . My conscience does not allow me to protect myself by sacrificing these idealistic and hopeful people, and I am not going to do it. As a matter of conscience, as a matter of principle, as a matter of morality, I have decided that I shall not conform to the request of this subcommittee." (Ibid, p. 25)

He further explained

> "The circulating of petitions is an important part of our democratic process. If it were to be abolished or greatly inhibited, our nation would have made a step toward deterioration—perhaps toward the state of dictatorship, a police state.
>
> ". . . Now, no matter what assurances this subcommittee might give me about the use of the names of the people who circulated the petition that I wrote, I am convinced that these names would be used for reprisals against these believers in the democratic process; these enthusiastic, idealistic, high-minded workers for peace. I am convinced of this because I myself have experienced the period of McCarthyism and to some extent have suffered from it, in ways that I shall not mention. I am convinced of it because I have observed the workings of the Committee on Un-American Activities of the House of Representatives and of this Subcommittee on Internal Security of the Judiciary Committee of the Senate. I feel that if these names were to be given to this Subcommittee the hope for peace in the world would be dealt a severe blow." (Ibid, p. 24)

The complaint alleged (¶ V) that

> "... reprisals, in the form of harassment, and in some instances loss of employment, will be experienced by those who have distributed or circulated said petitions upon plaintiff's submitting to said Committee the names of such persons."

The complaint, accordingly, sought an adjudication of petitioner's rights and duties with respect to said order *duces tecum* pertaining to the names of the distributors of the petition; and a judicial ruling adjudging that portion of the order of the Committee to be illegal and void.[3]

REASONS FOR THE ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING SAME.

The courts below have decided important questions, which should be settled by this Court.

These include:

(1) Whether the First Amendment protects a witness, who has refused to disclose names of circulators of a petition, because of fear of reprisal where those fears are posited on reality.

This issue is similar to that to be adjudicated by this Court in *Shelton* v. *Tucker*, 362 U. S. 958, and *Carr* v. *Young*, 363 U. S. 826, Nos. 14 and 18 respectively, this Term (certiorari granted on April 25, 1960 and June 20, 1960, respectively).

Additionally, the rulings of the courts below on the foregoing issue are in conflict with the decisions of this Court in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, *Bates* v. *City of Little Rock*, 361 U. S. 516, and *Talley* v. *California*, 362 U. S. 60.

---

[3] Relief sought with respect to the United States Attorney and the Sergeant-at-Arms of the Senate will be discussed later.

(2) Whether an order requiring disclosure of names, as indicated above, where there is no showing by, or even claim by, the Committee that a *single* distributor of the petition to the United Nations was a Communist, or in any manner affiliated with Communists or Communism, is an "indiscriminate dragnet procedure, lacking in probable cause" (*Barenblatt* v. *United States*, 360 U. S. 109, 134) so as to violate (in addition to First Amendment rights aforesaid) freedom from unreasonable searches and seizures guaranteed by the Fourth Amendment to the Constitution of the United States.

This Court will adjudicate the validity of an order *duces tecum* by a Congressional committee, involving similar issues, in *McPhaul* v. *United States*, No. 33 this Term (certiorari granted March 21, 1960), 362 U. S. 917.

Here again, the rulings of the court below are in conflict with *Barenblatt* v. *United States*, 360 U. S. 109.

In addition to *McPhaul* v. *United States*, *supra*, this Court has granted certiorari in *Wilkinson* v. *United States*, No. 37, 362 U. S. 926, and *Braden* v. *United States*, No. 54, 362 U. S. 960 (certiorari granted on March 28, 1960 and April 25, 1960; respectively). Both involve the scope of *Barenblatt* v. *United States*, *supra*, and *Watkins* v. *United States*, 354 U. S. 178.[4]

(3) Whether a committee of the Congress exceeds its authority in ordering the disclosure aforesaid, where the petition circulated is directed to the United Nations, and not to the Congress; and whether such inquiry is pertinent to any lawful authority of the Senate Subcommittee on Internal Security.

---

[4] Should the court allow certiorari in any of the following petitions, the granting of certiorari herein would seem even more appropriate: *Whitman* v. *United States*, No. 300, this Term; *Price* v. *United States*, No. 331; *Liverright* v. *United States*, No. 328; *Deutsch* v. *United States*, No. 233; *Shelton* v. *United States*, No. 246; *Russell* v. *United States*, No. 239; *Gojak* v. *United States*, Misc. No. 313.

This is a new question not heretofore decided by this Court.

(4) Whether a witness who objects to being required to submit documents, whose legal (and moral) objections are rejected by a Congressional committee, and who is ordered to produce such documents, has standing to secure declaratory relief, and whether it is a justiciable controversy ripe for adjudication; or whether his only recourse is to await a contempt proceeding before the Senate or a criminal prosecution under 2 U. S. Code, Section 192, and defend against either (or both). This is a question never heretofore decided by this Court—a question which needs adjudication by this Court.

ARGUMENT.

I.

THE ORDER DUCES TECUM OFFENDS FREEDOM OF SPEECH, FREEDOM OF THE PRESS, FREEDOM OF ASSEMBLY AND THE RIGHT TO CONSCIENCE, AS GUARANTEED BY THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Here, as in *United States* v. *Rumely*, 344 U. S. 41, 46, the petitioner's petition having been directed to the United Nations, the "radiations of influence" which the petitioner or the circulators of the petition exerted "upon the ultimate legislative process" were so remote as to "raise doubts of constitutionality in view of the prohibition of the First Amendment."

There, as Justice Douglas put it in his concurrence, "The purchase of a book or pamphlet today may result in a subpoena tomorrow" (at p. 57); here, the distributors of the petition (two or three years ago) upon disclosure of their names by the petitioner may receive a subpoena from the Committee tomorrow—and more—they may be subject to harassment and loss of employment.

For the views expressed by the petitioner, and shared by the circulators of the petition, were then "dissident be-

liefs" (*N.A.A.C.P.* v. *Alabama*, *supra*, 357 U. S. 449 at 462); and "identification and fear of reprisal might deter perfectly peaceful discussion of public matters of importance." (*Talley* v. *California*, 362 U. S. 60, 65.) Surely there is no issue in American public life today more important than the prospect of World War III; and no agency of the Government should be permitted by this Court to discourage public discussion of that issue.

That witnesses subpoenaed before Congressional committees suffer reprisal is a matter of common knowledge, and known to this Court; and this is as true of the Committee whose order is being challenged here as it is of the House Committee on Un-American Activities.

Thus, the record in this Court in *Price* v. *United States*, *supra*, this Term, No. 331, discloses that the petitioner there lost his employment with the New York Daily News following his being subpoenaed by this Committee.

The fate of Mary Knowles following her appearance under subpoena before this Committee and after invoking the First Amendment is thus recounted by the Court of Appeals for the District of Columbia Circuit (*Knowles* v. *United States*, No. 13,734, decided June 18, 1960) that she "was discharged from her position as a librarian in Norwood, Massachusetts, but obtained similar employment at a library maintained by a Quaker group in Pennsylvania. That group became subject to considerable pressure in the community to dismiss appellant from her position as librarian." (P. 3, slip opinion.)

Presumably the Committee in the case at bar was looking for Communists (see opening statement of Chairman, p. 3 of Hearing). Accordingly, the mere fact of being subpoenaed by the Committee would mean that such person was a suspected Communist or associate of Communists. This Court recognized that to be subpoenaed before a governmental agency, as a suspected Communist, is to smear

upon such person "a stain of the stamp of disloyalty" (*Sweezy* v. *New Hampshire*, 354 U. S. 234, 238); and the Court; in a context not too dissimilar, noted that "designation" may work "immediate substantial harm" (*Joint Anti-Facist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 159).

II.

THERE WAS NO PROBABLE CAUSE FOR THE ISSUANCE OF THE ORDER DUCES TECUM. ACCORDINGLY, IT VIOLATES RIGHTS GUARANTEED BY THE FOURTH AMENDMENT AND CONSTITUTES AN UNREASONABLE SEARCH AND SEIZURE.

The Committee, in the course of the hearing, at no time made any showing, or even asserted the claim, that any Communist had anything to do with the distribution of the petition.

Assuming the Committee was looking for Communists, in connection with the distribution of the petition, absent any such showing or claim, the effect of the order *duces tecum* is a general "fishing expedition . . . for the chance that something discreditable might turn up—[5] an undertaking which uniformly has met with judicial condemnation." (*Jones* v. *Securities & Exchange Comm.*, 298 U. S. 1, 26.)[6] See also Justice Holmes' comments, for the Court, in *Interstate Commerce Comm.* v. *Brimson* 154 U. S. 447, 479, and *Federal Communications Comm.* v. *American Tobacco Co.*, 264 U. S. 298, 305-6.

All three of the foregoing cases adjudge subpoenae *duces tecum* by administrative agencies to constitute unreasonable searches and seizures.

We think it clear that a compulsory seizure of documents, by any governmental agency, and whether through search warrant or subpoena *duces tecum*, must be posited on probable cause.

---

[5] Namely, that a Communist might turn up.

[6] Applied to a Congressional committee in *United States* v. *Kamin*, 135 F. Supp. 382.

Compare Fourth Amendment; and see *Henry* v. *United States*, 361 U. S. 98. See also *Barenblatt* v. *United States*, *supra*.

III.

THE ORDER DUCES TECUM IS NOT PERTINENT TO ANY MATTER WITHIN THE COMMITTEE'S AUTHORITY AND IS BEYOND ITS JURISDICTION.

As heretofore indicated, the petition prepared by the petitioner and circulated by him and others was directed to the United Nations; *not* to the Congress.

The members of the Committee, in seeking to explain the pertinency of the documents to its authority, gave examples of petitions directed to the *Congress* (Transcript of Hearing, p. 29). In any event, it is inconceivable what legislation the Committee might propose, for Congress to adopt, having to do with the circulation of a petition to the United Nations.

IV.

THE PETITIONER HAS STANDING TO SUE; THE COMPLAINT STATES A PRESENT JUSTICIABLE CONTROVERSY, WHICH IS RIPE FOR ADJUDICATION.

(1) The order *duces tecum*, made by the Committee, after rejecting legal objections proffered by the petitioner, is "definite and concrete" within the requirements delineated in *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240 (quoted with approval in *Joint Anti-Fascist Comm.* v. *McGrath*, *supra*, 341 U. S. at 152, concurring opinion). See also *Public Service Comm.* v. *Wycoff Co.*, 344 U. S. 237, 243.

(2) The fact that there may be another remedy available to the petitioner, as, for example, a defense to a criminal prosecution launched against him under 2 U. S. Code, Section 192 (compare *Barenblatt* v. *United States*, *supra*); or the writ of habeas corpus, in the event he is imprisoned in a contempt proceeding at the bar of the Senate (compare *Jurney* v. *McCracken*, 294 U. S. 125) does not bar him from securing equitable relief.

The Federal Declaratory Judgment Act, 28 U. S. Code, Section 2201, expressly authorizes declaratory relief "whether or not further relief is or could be sought"; and Rule 57, Federal Rules of Civil Procedure, without equivocation, provides:

> "The existence of another *adequate* remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." (Italics ours.)

(3) In any event, defense to a criminal prosecution is not, to the petitioner, an *adequate* remedy at law.

(a) The penalties are severe and dual. The petitioner may be housed in the "common jail" both following a citation by the Senate itself, and a prosecution under 2 U. S. Code Section 192.

See *Jurney* v. *McCracken*, *supra*, 294 U. S. 125.

Under the latter, the imprisonment may be up to twelve months. Many have received such a sentence and have served it. See *Lawson* v. *United States*, (C.A.D.C.) 176 F. 2d 49, 51, 85 A.D.C. 167.[7]

In the three cases, *supra*, in this Court in which certiorari has been granted, *Wilkinson*, *Braden*, and *McPhaul*, the sentences are, respectively, one year, one year, and nine months.

(b) In a criminal prosecution, under 2 U. S. Code Section 192, the petitioner is "bound rightly to construe the statute. His mistaken view of the law is no defense." *Sinclair* v. *United States*, 279 U. S. 263, 299, followed in *Watkins* v. *United States*, 354 U. S. 178, 208.[8]

---

[7] This case is known as that of the "Hollywood Ten." Most, if not all, of the ten received and served the maximum sentence.

[8] We shall argue later that declaratory judgment is a peculiarly appropriate judicial remedy to afford the citizen a *correct* view of the law.

And yet the applicable law, as to the rights of a witness before a Congressional committee, is presently uncertain—determined often by a narrowly divided court. Compare *Barenblatt* v. *United States, supra.*

Indeed, "more law will be made" on the subject by this Court during this forthcoming Term of Court in the *McPhaul, Wilkinson* and *Braden* cases, *supra.*

(c) Declaratory judgment is an appropriate *remedy* in the light of the foregoing hazards resulting from criminal sanctions.

In circumstances less onerous and less perilous than those facing the petitioner, the courts of the United States have granted declaratory or other equitable relief.

But recently, in *Evers* v. *Dwyer*, 358 U. S. 202, 203, this Court ruled that the citizen need not run "the risk of arrest" under a State statute requiring racial segregation on buses, in order to challenge the regulation; but that he might secure relief in a United States District Court under the Declaratory Judgment Act.

Similarly, an alien need not undergo the "odium of arrest and detention" (*Brownell* v. *Tom We Shung*, 352 U. S. 180, 183) by being required to resort to habeas corpus to challenge the validity of a deportation or exclusion order; on the contrary, he may secure an adjudication of his rights in a suit for declaratory relief.

See also *McGrath* v. *Kristensen*, 340 U. S. 162; and cf. *Perkins* v. *Elg*, 307 U. S. 325.

Moreover, the order of the Committee being challenged herein may minimally be termed to be a "demand" upon the petitioner. A demand by an Executive Officer of the Secretary of the Interior was held to be the subject of equitable relief in *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492, 498, this Court ruling:

> "The plaintiff was not required, in order to test the validity of the demand, . . . to rely entirely upon de-

> fending such suit as might be brought by the Attorney General. On the contrary, if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity. . . . The hazards and embarrassment incident to any such course were such as to entitle it to act promptly and affirmatively. . . ."

So in *LaCrosse Tel. Corp.* v. *Wisconsin Emp. Rec. Board*, 336 U. S. 18, 22, there was standing to sue, because the action of a State Labor Board certifying a union fixed "a status to which Wisconsin provides a (criminal) sanction. . . ."

Of the two foregoing cases, Justice Frankfurter, in his dissertation on what constitutes "standing to sue," concurring in *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123 at 156, says:

> ". . . And if the determination challenged creates a status which enforces a course of conduct through penal sanctions, a litigant need not subject himself to the penalties to challenge the determination. . . ."

We suggest the petitioner is in such a status.

We have heretofore indicated some of the perils facing the petitioner if he may not secure declaratory relief in this proceeding.

The Declaratory Judgment Act is designed especially to avoid these perils. Borchard, *Declaratory Judgments*, Second Edition, under the heading, "Special Purposes and Advantages" (at p. 282) of a declaratory judgment, states that it is available ". . . to make it unnecessary for a plaintiff to act upon his own interpretation of his rights and at his peril . . . thus avoiding the necessity of leaps in the dark."[9]

---

[9] Borchard makes the same point more entertainingly when he states (at p. 278) that declaratory judgment is designed to avoid "telling the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool is to eat it."

(A) Analysis of Chief Judge Prettyman's Statement

The court below, on September 6, 1960, entered an order (Appendix A) affirming the order of the District Court dismissing the complaint. The order recited, "Each judge reserves the right to file a statement as to his views."

On September 7, 1960, Chief Judge Prettyman made such a statement (Appendix B). We consider Judge Prettyman's statement below:

(1) Judge Prettyman states (p. 1 of Statement), "at the conclusion of an extensive colloquy Pauling was directed clearly and succinctly by Senator Dodd . . ." to appear at a later date and bring with him the records at issue herein.

Accordingly, the order challenged by the petitioner is "definite and concrete," *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240; and hence ripe for adjudication.[10]

(2) Of course, the United States courts will not exercise their authority *"in vacua"* (p. 2); and will not render "advisory opinions" (p. 2); and we agree that "judicial authority arises upon the happening of an event or the existence of a fact" (p. 2).

Here, the event *has* happened—an order has been made on the petitioner; the fact *does* exist—namely, the order.

Accordingly, the petitioner is not seeking a decision (p. 3) on "an abstract, hypothetical or contingent question" within the ban suggested in *Federation of Labor* v. *McAdory*, 325 U. S. 450, 461.

And Judge Prettyman recognizes (at a later point in his statement, p. 7) that if the courts were to hold the order of the Committee to be void "it is unthinkable . . . the Committee would nevertheless attempt to enforce that directive."

---

[10] At another point in his statement (p. 7) Judge Prettyman refers to the Committee's order, at issue herein, as a "specific directive."

Hence the suggestion by Judge Prettyman (p. 7) that the petitioner seeks a "declaratory judgment respecting the validity of *contingent* congressional action . . ." (italics ours) misapprehends the complaint. It is directed to *action* by the Committee, not action *contemplated*, but action *taken* —namely, the order issued on June 21, 1960, presently outstanding, to be complied with by the petitioner on October 11, 1960.[11]

It follows accordingly that the complaint does not ask the courts "to interfere with or impede the processes of the Congress by proscribing anticipatorily its inquiries" (p. 4).

And the decisions cited by Judge Prettyman (f.n. 3, p. 4) in support of the above, are inapposite to the instant case:

In *Mins* v. *McCarthy* (C.A.D.C.), 209 F. 2d 307, the case reached the courts at a time when the questions to be propounded to the witness were *undefined;* here there is a *definite* order. (Here, the petitioner answered all questions.)

And in *Fishler* v. *McCarthy*, 117 F. Supp. 643, 218 F. 2d 164, the ruling of the District Court was affirmed by the Court of Appeals, *per curiam*, expressly on the narrow ground that the District Court lacked venue.

Nor can we agree with the suggestion by Judge Prettyman (adopting the argument of the respondents below) that the granting of relief to the petitioner violates the doctrine of separation of powers (p. 14).

(a) That doctrine manifestly applies to the Executive, as well as to the legislative branches of our government.

---

[11] On September 8, 1960, an application to stay the enforcement of and or the return date of the order of the Committee then set for September 15, 1960, until October 10, 1960 (to afford this Court an opportunity to pass upon this petition) was filed in this Court. Thereupon the respondent Dodd, in behalf of the Committee, continued the hearing to October 11, 1960.

In appropriate cases the United States courts have "interfered with" the Executive—in the sense of determining the legality of acts taken or threatened, by officials of the Executive. We list some examples below.[12]

(b) The authority of the courts to review action by a congressional committee, upon an imprisonment for contempt before the bar of either House, or following a criminal prosecution under 2 U.S.C. Section 192, is admitted.

Compare *Jurney* v. *McCracken*, *supra*, *Barenblatt* v. *United States*, *supra*. Such review is not deemed, *per se*, to be a judicial "interference" with the Congress.

Accordingly, the only question is not whether the petitioner may have a judicial review of the order challenged herein, but *when*.

We suggest *now* is an appropriate time; the transcript of the hearing accorded the petitioner by the Committee was before the courts below, and is in this Court. The validity of the Committee's order upon the petitioner may be as readily and appropriately determined now, as to relegate the petitioner to await adjudication in a proceeding carrying severe penal sanctions.

Indeed, the Department of Justice, in behalf of the United States, has heretofore taken a broader position (on the issue of separation of powers) than does the petitioner here.

In *United States* v. *Owlett*, 15 F. Supp. 736 (M.D. Pa. 1936), the United States sought an injunction against an

---

[12] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (injunction against the Secretary of Commerce from carrying out an order of the President); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (injunction against the Secretary of War); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (declaratory and injunctive relief against the Attorney General); *Dayton* v. *Dulles*, 357 U. S. 144 (declaratory relief against the Secretary of State); *Peters* v. *Hobby*, 349 U. S. 331 (declaratory relief against the Secretary of Health, Education and Welfare; injunction against the Civil Service Commission); *Perkins* v. *Elg*, 307 U. S. 325 (declaratory relief against the Secretary of Labor). This list is, by no means, intended to be exhaustive.

investigating committee of the Pennsylvania legislature to prevent it "from conducting an investigation into the organization, administration and functioning of the Works Progress Administration in Pennsylvania."

Thus this was an attempt far more directly than the petitioner's, to "interfere" with the very functioning of a legislative committee in its attempt to *get* information. The Court granted the injunction, saying, during the course of its opinion (p. 742):

> "The investigating power of a legislative body is limited to obtain information on matters falling within its proper field of legislative action . . ."

Accordingly, since Pennsylvania could not pass any legislation as to the W.P.A., since this would be State interference with a proper governmental function of the United States, its legislative committee had no authority in the matter and could be, and was, enjoined.

The Court rejected the argument that it should not or could not interfere with a legislative committee and that the proper way for the Court to handle the matter was not to enjoin the committee, but that the persons called before the committee could refuse to respond or to answer questions and the matter could be tested in proceedings arising therefrom. The Court said (p. 743):

> "The suggestion that federal employees could refuse to obey the subpoenas, or seek relief by *habeas corpus* from imprisonment for disobedience is no relief. . . ."

State cases are in accord: *Greenfield* v. *Russell*, 292 Ill. 392; *Luscomb* v. *Bowker*, 334 Mass. 468.

And in *Attorney General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co.*, Engl. L. R. 1914 A. C. 237, the Privy Council ruled that a witness may secure a declaratory judgment and injunction against a Royal Com-

mission, exceeding its authority, in requiring the production of documents.

3. Finally, we agree, of course, with Judge Prettyman that, in the case at bar, "no detention has occurred" (p. 3); and that petitioner has not yet been prosecuted for contempt; but the very purpose of the complaint herein is to secure a judicial determination as to the validity of the order challenged wthout the petitioner risking, as heretofore indicated, the "odium of arrest and detention," *Brownell* v. *Tom We Shum*, 352 U. S. 180, 183, or running "the risk of arrest," *Evers* v. *Dwyer*, 358 U. S. 202, 203.

V.

THE PETITIONER HAS STANDING TO SUE THE RESPONDENT JOSEPH C. DUKE AS SERGEANT-AT-ARMS OF THE SENATE

The respondent Duke, under express direction of the respondent James O. Eastland, as Chairman of the Committee so to do, served upon the petitioner the subpoena issued by said Eastland to appear before the Committee on June 20, 1960; the order of suboena *duces tecum* contested herein, is an order supplemental to, and ancillary to, the subpoena aforesaid; for it was by virtue of the subpoena and the service thereof by said respondent Joseph C. Duke that the Committee secured jurisdiction over the petitioner to make the ancillary order *duces tecum* which is the issue herein.

It is clear that an officer of the Congress who serves or enforces an order of the Congress, where that order is invalid, is liable in damages for resulting injuries.

Kilbourn v. *Thompson*, 103 U. S. 168.

It follows from *Kilbourn* that had the petitioner suffered substantial damages as a result of the service upon him of the subpoena, if it were invalid, he could recover such damages from said respondent Duke; where the consequences to said petitioner are less serious than they were in *Kilbourn*, the petitioner has as much standing to sue as did Kilbourn.

VI.

THE PETITIONER HAS STANDING TO SUE THE RESPONDENT OLIVER GASCH AS UNITED STATES ATTORNEY.

Upon the matter being certified to him, the respondent Oliver Gasch, as United States Attorney, is under requirement to present it to the Grand Jury (2 U.S.C. Sec. 194).

That equitable relief is available in exceptional circumstances to enjoin a criminal prosecution is settled; a United States Attorney was so enjoined in *Shields* v. *Utah, Idaho Central R. R. Co.*, 305 U. S. 177, 183. There this Court stated:

> "... Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions." (Citing *Philadelphia Co.* v *Stimson*, 223 U. S. 605, 621, 622; *Truax* v. *Raich*, 239 U. S. 33, 37, 38; *Terrace* v. *Thompson*, 263 U. S. 197, 214.)

With respect to the respondents Joseph C. Duke [13] and Oliver Gasch, the petitioner seeks relief against them, only in the event that the Court should determine that it has no jurisdiction to grant the relief prayed for against the respondent Thomas J. Dodd with respect to the order *duces tecum* issued by said respondent.

In that event, we urge the Court to adjust the remedy to meet the petitioner's need, for it has been decided that "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 372 U. S. 678, 684.

Respectfully submitted,

A. L. Wirin
Fred Okrand
257 S. Spring Street
Los Angeles, California
Attorneys for Petitioner

September 16, 1960

[13] We have joined Senator Eastland as a defendant solely because the jurisdiction of the Court over the defendant Duke would stem from the subpoena issued by Senator Eastland and served by said defendant.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959

No. 15,963

District Court Civil Action 2477-60
LINUS PAULING, *Appellant*,

v.

JAMES O. EASTLAND, *et al.*; *Appellees*.

FILED—Sept. 6, 1960, Joseph W. Stewart, Clerk

Before: PRETTYMAN, Chief Judge, BAZELON and BASTIAN, Circuit Judges, in Chambers.

Order

This case came on for consideration on appellant's motion for a stay of the effect of or the return day of an order *duces tecum* made by appellee, Senator Thomas J. Dodd, for and in behalf of the United States Subcommittee on Internal Security, and on appellant's motion that the case be submitted on the merits, and counsel for appellees have agreed that the case should be submitted on the merits, and having heard argument on the motion for a stay and on the merits,

it is

ORDERED by the court that the motion for a stay is denied and that the judgment of the District Court on appeal is affirmed.

Per Curiam.

Dated September 6, 1960.

Each judge reserves the right to file a statement as to his views.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15963

LINUS PAULING, *Appellant*,

v.

JAMES O. EASTLAND, *et al.*, *Appellees*.

Appeal from the United States District Court
for the District of Columbia

Statement of Chief Judge Prettyman on Appellant's Motion for Stay Pending Appeal and on the Merits

---

Filed September 7, 1960

Mr. A. L. Wirin for appellant.

Mr. Carl W. Belcher, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, was on the pleadings, for appellees.

Before PRETTYMAN, Chief Judge, and BAZELON and BASTIAN, Circuit Judges.

PRETTYMAN, *Chief Judge:* In view of the limitations of time upon the appellant in this matter I am filing this somewhat sketchy memorandum of my views without attempting to formalize them into an opinion and without awaiting the statements of my brethren.

Appellant Pauling, a resident and citizen of California, participated in the preparation of a petition addressed to the United Nations, urging an international agreement for the cessation of the testing of nuclear weapons. More than eleven thousand signatures of persons from forty-nine countries appeared on the petition. The matter came to the attention of the Subcommittee on Internal Security of the United States Senate and was made a subject of inquiry by that Committee. At the conclusion of an extensive colloquy Pauling was directed clearly and succinctly by Senator Dodd, presiding at the meeting of the Subcommittee, to appear at a later date, now fixed as September 15, 1960, and to bring with him "all signatures or purported signatures to the petition presented by you to the Secretary General of the United Nations on January 15, 1958, together with all letters of transmittal by which, or in connection with which, such signatures were transmitted to you or received by you." Pauling agreed to comply with the first part of the directive, pertaining to the signatories, but declined to comply with the second part, pertaining to the letters of transmittal. Given a choice between complying with the entire directive or, by refusal, rendering himself liable to a recommendation to the Senate for citation for contempt, Pauling brought a civil action in the District Court in the District of Columbia for a declaratory judgment. His prayer was that the court declare the directive of the Subcommittee void and enjoin enforcement of the directive and possible prosecution for failure to comply. He also moved for an interlocutory stay *pendente lite*. The District Court dismissed the complaint. Pauling appealed and applied here for a stay.

We do not initially consider the validity of the order of the Senate Subcommittee. We must first consider a threshold question, which is the availability of judicial consideration at this point under the circumstances which have thus far transpired. Judicial authority arises upon the happening of an event or the existence of a fact, or sometimes

the threat of an event or a fact. It does not come into being *in vacuo*. In our jurisprudence courts do not have inherent power, absent specific Constitutional or legislative provision, to render advisory opinions. We have the declaratory judgment statute. But even to invoke that process the circumstances must bring the matter within the bounds of judicial power. There must be a justiciable controversy. The action calls for the exercise of a power to declare existing law upon existing facts.[1] The Supreme Court said, in *Federation of Labor* v. *McAdory*:[2]

> "The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. * * * This Court is without power to give advisory opinions. * * * It has long been its considered practice not to decide abstract, hypothetical or contingent questions, * * * or to decide any constitutional question in advance of the necessity for its decision; * * * or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, * * * or to decide any constitutional question except with reference to the particular facts to which it is to be applied * * *."

For declaratory judgment there must not only be a controversy, but the controversy must be justiciable.

Our initial question is whether the events which have thus far occurred and the factual situation which presently exists are such that the authority of the judiciary can be invoked at this point. No detention has occurred. The date when Pauling must decide whether to comply or not to comply with the directive has not arrived. He has not been cited for contempt or reported to the Senate for citation.

It seems quite clear that as a matter of basic general principle a court cannot interfere with or impede the

---

[1] 1 ANDERSON, DECLARATORY JUDGMENTS § 9, p. 46 (2d ed. 1951).

[2] 325 U. S. 450, 461 (1945).

processes of the Congress by proscribing anticipatorily its inquiries.[3] This is so not only from the viewpoint of the Constitutional separation of powers between two branches of the Government but also from the practical viewpoint of simple procedural efficiency.

It is of course true, as Pauling argues, that the courts may review a judgment of conviction in a criminal case for contempt of the Congress and in such a proceeding may hold the attempted action by the Congress, or its Committee, invalid. But such a judgment by the court is clearly the exercise of a judicial function, similar to the duty and function of the court to review the impact of an enactment by the Congress upon the property or business of a citizen. If a person under indictment or under judgment of conviction is before a court and challenges the indictment or conviction, the court must apply the law, paying heed and giving effect, first of all, to Constitutional provisions. The indictment or conviction gives incidence to judicial power. There are circumstances under which a court of equity will enjoin criminal prosecutions or consider their validity in an action for declaratory judgment.[4] These cases constitute an exception to the general rule that courts of equity will not interfere with criminal prosecutions. Exceptional circumstances of compelling force create the exception. In the case at bar the present situation of appellant Pauling is as we have described it, and on the other hand, contrawise, is the right of the Senate to pursue its legislative duties without judicial interference. The separation of powers principle is one of the basic concepts of the Consti-

[3] Mins v. McCarthy, 93 U. S. App. D. C. 220, 209 F. 2d 307 (D. C. Cir. 1953); Fischler v. McCarthy, 117 F. Supp. 643 (S. D. N. Y. 1954); *aff'd*, 218 F. 2d 164 (2d Cir. 1954).

[4] See, *e.g.*, Terrace v. Thompson, 263 U. S. 197 (1923); Packard v. Banton, 264 U. S. 140 (1924); Evers v. Dwyer, 358 U. S. 202 (1958); BORCHARD, DECLARATORY JUDGMENTS 1020 et seq. 2d ed. 1941); 2 ANDERSON, DECLARATORY JUDGMENTS 1471 et seq. (2d ed. 1951).

tution. The courts have no power of interference, unless and until some event, such as arrest, indictment or conviction, brings an actual controversy into the sphere of judicial authority. The courts cannot interfere merely upon the petition of a person potentially liable to some such event. It is clear to me that the doctrine of the separation of powers prevails here.

Basing his argument upon the opinions of the Supreme Court in the *Jurney*[5] and *McGrain*[6] cases, Pauling argues that if he were under detention he could test by an action for habeas corpus the power of the Senate to try him for contempt; and that the same rights available to him in a proceeding for habeas corpus are available to him in an action for declaratory judgment when he is not under detention. But the purpose of the Great Writ is to test the validity of a detention. When a person is under detention he has been and is being deprived of his liberty, and this fact is sufficient to invoke judicial power. The same basic doctrine, which we have mentioned as to judicial power to review convictions, would seem to apply, under the *Jurney* and *McGrain* opinions, to judicial power when a person is under detention but not under conviction. I think the incidence of judicial power invoked by petition for habeas corpus, an extraordinary remedy, available to test the legality of a detention, does not occur when no detention has occurred. The facts which would bring the dispute within the orbit of judicial power have not taken place. The rights available under the Writ do not arise when the basic justification for the Writ does not exist. A holding by a court that the judicial power available under the Writ to a person under detention is likewise available to any person under any circumstance, detained or not, would be flatly contrary to the history, intent, purpose, and undeviating interpretation of the Writ.

---

[5] Jurney v. MacCracken, 294 U. S. 125 (1935).

[6] McGrain v. Daugherty, 273 U. S. 135 (1927).

Although on argument here Pauling concedes that he could not obtain from a court an injunction against the contemplated action of the Senate Subcommittee, or of the Senate, he contends that a declaratory judgment in respect to his rights and in respect to the validity of the contemplated action would not really interfere with the Senate. But such a differentiation seems to me to be without substance. It is unthinkable to me that, if the Courts should hold a specific directive of a Committee of the Congress unconstitutional and void, the Committee would nevertheless attempt to enforce that directive. So, as I view it, a declaratory judgment would be as effective an impingement upon and interference with legislative proceedings as a flat injunction would be. Thus I think that a declaratory judgment respecting the validity of contemplated Congressional action would violate the doctrine of the separation of powers and would be an illegal impingement by the judicial branch upon the duties of the legislative branch.

The material which appellant Pauling refuses to produce consists of the letters by which various persons transmitted to him signatures for the petition. He says that production of these letters would disclose to the Congress names of the people who secured the signatures. He says he will not reveal their names because of his fear of "reprisals" against them. By reprisals he says he means possible loss of employment, black-listing, ostracism, etc. He argues that the directive of the Subcommittee is therefore violative of his First Amendment rights. But, as I have already indicated, I do not reach that question, *i.e.*, the validity of the directive, because I do not find judicial power to consider it in the present posture of the case.

In summation, it is perfectly clear in my view that, if Pauling should be cited for contempt and thereafter convicted, either by the Senate or by a court, of contempt, the courts will review that judgment and may in that proceeding pass upon the validity of the order of the Subcommittee.

It is equally clear to me that the courts have no power in the proceeding presently before us to pass upon, either by injunction or by declaratory judgment, the validity of the Subcommittee order. I have therefore voted to affirm.

APPENDIX "C"

Amendment I to the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV to the United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Federal Declaratory Judgment Act 28 U. S. Code. Section 2201

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

FILE COPY

Office Supreme Court, U.S.
FILED
SEP 20 1950
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. [illegible]

[illegible]

[illegible]

and [illegible]

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

David L. [illegible]
1411 K Street, N. W.
Washington 5, D. C.

Lawrence [illegible]
1012 I Street, N.W.
Washington 5, D. C.

[illegible]
[illegible]
[illegible]

Of Counsel:
[illegible]
[illegible] 46th Street
New York 17, New York

INDEX

Page

Statement 1

Interest of the Amicus 2

Questions Presented 4

Statement of the Case 5

Reasons for Granting the Writ 6

Conclusion 10

CITATIONS

Cases:

Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227 (1937) 7

Barenblatt v. *United States*, 360 U.S. 109 (1959) 3, 8, 9

Bates v. *Little Rock*, 361 U.S. 516 (1960) 9

Braden v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 926 3

Brownell v. *Tom We Shung*, 352 U.S. 180 (1956) 8

Deutch v. *United States*, No. 233, this Term 3

Eccles v. *Peoples Bank*, 333 U.S. 426 (1948) 7

Fisher v. *McCarthy* (D.C., S.D.N.Y.), 117 F. Supp. 643, aff'd 218 F. 2d 164 (Pet. App. 24) 6

Gojack v. *United States*, Misc. No. 313, this Term 3

Hearst v. *Black* (C.A.D.C.), 87 F. 2d 68 7

Hines v. *Grimes Packing Co.*, 337 U.S. 86 (1949) 7

Joint Anti-Fascist Refugee Comm. v. *McGrath*, 341 U.S. 123 (1951) 7

Jones v. *S.E.C.*, 298 U.S. 1 (1936) 7

Lovinger v. *United States*, No. 328, this Term 3

McPhaul v. *United States*, No. 33, certiorari granted, 362 U.S. 917 3

Muse v. *McCarthy* (C.A.D.C.), 209 F. 2d 307 6

N.A.A.C.P. v. *Alabama*, 357 U.S. 449 (1958) 9

Pfeiffer v. *McElroy* (C.A.D.C.), 278 F. 2d 252 10

Price v. *United States*, No. 231, this Term 3

Russell v. *United States*, No. 239, this Term 3

Shelton v. *United States*, No. 246, this Term 3

Shields v. *Utah, Idaho Central R.R. Co.*, 305 U.S. 177 (1938) .....
Sinclair v. *United States*, 279 U.S. 263 (1929) .....
Sweezy v. *New Hampshire*, 354 U.S. 234 (1957) .....
Talley v. *California*, 362 U.S. 60 (1960) .....
Watkins v. *United States*, 354 U.S. 178 (1957) .....
Whitman v. *United States*, No. 300, this Term .....
Wilkinson v. *United States*, No. 37, certiorari granted, 362 U.S. 926 .....

STATUTES AND RULES:

2 U.S.C. §192 .....
Declaratory Judgment Act of 1934 .....
Rule 42, U.S. Supreme Court .....
Rule 44(7), U.S. Supreme Court .....

OTHER AUTHORITIES:

Sen. Rep. No. 1005, 73rd Cong., 2d Sess. 2 (1934) ...
United Nations Review, Volume 6, Number 11, May 1960, p. 43 .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 419

LINUS PAULING, *Petitioner*,

v.

JAMES O. EASTLAND, THOMAS J. DODD, OLIVER GASCH, and JOSEPH C. DUKE

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE, IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT

This brief is submitted by the American Civil Liberties Union, *amicus curiae*, with the written consent of both parties filed with the Clerk of this Court. In this brief, the *amicus* will support petitioner's petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit, which, on September 6, 1960, affirmed an order of the United States District Court dismissing petitioner's complaint.

While the American Civil Liberties Union is aware that this Court does not favor *amicus curiae* briefs in support

of certiorari petitions, it is, nevertheless, filing the instant brief because of the importance of this case and because of its concern that if certiorari is denied it will be deprived of an opportunity to submit *on the merits*[1] its views with respect to what is, perhaps, the major issue involved, *viz.*: whether and under what circumstances a witness before a congressional committee can invoke the equity jurisdiction of the district court to adjudicate the validity of an order *duces tecum* prior to the institution of contempt proceedings against him. Unless certiorari is granted, this major and novel issue will, after October 11, 1960, have been mooted.[2]

INTEREST OF THE AMICUS

The American Civil Liberties Union is a national, non-partisan organization devoted solely to the protection and advancement of constitutional rights. Civil liberties, born of centuries of the people's struggle for dignity and freedom, are a basic part of man's heritage. Freedom of religion, thought, communication, assembly, dissent, freedom from discrimination, and the right to due process, are highly prized parts of this heritage. We are interested in this case because of our conviction that congressional

[1] Apart from the submission of a brief *amicus* on the merits in accordance with Rule 42, we are informed by petitioner's counsel that if certiorari is granted petitioner will permit the *amicus* to have a portion of petitioner's time for oral argument as provided by Rule 44(7).

[2] On September 9, 1960, the Solicitor General advised this Court that petitioner's reappearance before the Senate Subcommittee on Internal Security, originally scheduled for September 15, 1960, had been postponed to October 11, 1960. The Solicitor General further advised of the accelerated filing of the petition and brief in opposition in order to "afford this Court an opportunity to consider the petition and, if the Court is so disposed, to determine before October 11th whether to grant or to deny the writ of certiorari."

investigations involving broad-scale intrusions into the lives and affairs of private citizens have transformed the valid congressional power to investigate into exposure for exposure's sake. The docket of this Court bears witness to the insistent claim that since *Barenblatt* v. *United States*, 360 U.S. 109 (1959), the lower courts have been permitting congressional committees to ride roughshod over individuals' First, Fourth and Fifth Amendment rights.[3]

We are especially concerned with this problem in the instant case because petitioner is being compelled to disclose the names of persons who circulated and solicited signatures for a petition of some 11,000 scientists from some 49 nations as part of a world movement to secure action within the United Nations to arrest and prevent further contamination of the world's atmosphere caused by nuclear explosions. These are persons, who without reference to particular national interest, contributed their services in order to enable Linus Pauling (petitioner herein) to place before the United Nations an expression of a representative and impressive group of scientists from all over the world concerning nuclear contamination—a subject that affects all nations and peoples. Since the "Pauling petition" may not coincide with the nuclear or nationalistic policy of countries where some of these persons reside, they may become subject to persecution. Indeed, the Committee's insistence that petitioner disclose their names can only interfere with and restrain like

[3] *Braden* v. *United States*, No. 54, this Term, certiorari granted, 362 U.S. 926; *Wilkinson* v. *United States*, No. 31, certiorari granted, 362 U.S. 926; *McPhaul* v. *United States*, No. 33, certiorari granted, 362 U.S. 917; see also, this Term, *Deutch* v. *United States*, No. 233; *Shelton* v. *United States*, No. 246; *Russell* v. *United States*, No. 239; *Whitman* v. *United States*, No. 302; *Lovercight* v. *United States*, No. 328; *Price* v. *United States*, No. 331; *Gojack* v. *United States*, Misc. No. 313.

contributions of essential information to the United Nations by the world body of scientists.[4]

QUESTIONS PRESENTED

Embraced within petitioner's Statement of Questions presented (Pet. 2), are the following issues:

> (1) Whether and under what circumstances a witness before a congressional committee can invoke the equity jurisdiction of the district court to adjudicate the validity of an order *duces tecum* prior to the institution of contempt proceedings against him?
>
> (2) Does a dragnet order by a congressional committee requiring production of letters of transmittal through which signatures of more than 11,000 scientists were submitted to the United Nations in support of a petition condemning contamination of the world's atmosphere by nuclear explosions, where the result of such order would compel disclosure of the identities of, and retaliation against, those persons who circulated and transmitted said petition, relate to any valid legislative purpose?

---

[4] At the twenty-ninth session of the Economic and Social Council of the United Nations a Draft Declaration on Freedom of Information was sponsored by the United States and approved by a vote of 15 to 0, with 3 abstentions (Bulgaria, Poland and the USSR) for transmittal to the General Assembly. The Declaration proclaims that "our peoples should freely enjoy free interchange of information and access to all media of expression," that "all governments should pursue policies under which the free flow of information, within countries and across frontiers, will be protected," and that "no government or public or private body or interests should exercise such control over media for disseminating information as to prevent the diversity of sources of information or deprive the individual of free access to such sources." *United Nations Review*, Volume 6, Number 11, May 1960, p. 43.

STATEMENT OF THE CASE

Petitioner, Linus Pauling, is the holder of the 1954 Nobel prize for chemistry. He participated in the preparation of a petition filed with the Secretary General of the United Nations urging an international agreement for the immediate cessation of nuclear testing in order to prevent further radiation pollution of the world's atmosphere and damage to the pool of human germ plasm resulting in an increase of the number of defective children born in future generations.

The petition contained signatures of over 11,000 scientists, (including thirty-six Nobel laureates, among them Albert Schweitzer and Bertrand Russell,) from forty-nine countries. This movement of world scientists came to the attention of the Subcommittee on Internal Security of the United States Senate and, at the hearing before the Committee on June 21, 1960, petitioner was directed to appear at a later date, now fixed as October 11, 1960, and bring with him "all signatures or purported signatures to the petition presented by you to the Secretary General of the United Nations on January 15, 1958, together with all letters of transmittal by which, or in connection with which, such signatures were transmitted to you or received by you."

Petitioner answered all questions fully and responsively put to him by members of the Subcommittee and its Counsel. In addition, petitioner agreed to comply with the first part of the directive, pertaining to the signatories. However, petitioner declined to comply with the second part, pertaining to the letters of transmittal. Given a choice between complying with the entire directive or, by refusal, rendering himself liable to citation for contempt, petitioner brought a civil action in the District Court in the District of Columbia for a declaratory judgment on August 5, 1960. The complaint alleged that "reprisals, in the form of harassment, and in some instances loss of employment, will be experienced by those who have dis-

tributed or circulated said petitions * * *" (Pet. 5). His prayer was that the court declare the directive of the Subcommittee void and enjoin enforcement of the directive and possible prosecution for failure to comply. He also moved for an interlocutory stay *pendente lite*. On August 23, 1960, the District Court dismissed the complaint. Petitioner thereupon appealed to the Court of Appeals for the District of Columbia Circuit and applied for a stay. On September 6, 1960, the Court of Appeals affirmed, and on the same date, denied petitioner's motion to stay the outstanding and pending Subcommittee's order, now returnable October 11, 1960.

REASONS FOR GRANTING THE WRIT

I

Unless certiorari is granted on the issue of "justiciability," the question whether, and under what circumstances, a witness before a congressional committee can invoke the equity jurisdiction of the district court to adjudicate the validity of an order *duces tecum* prior to the institution of contempt proceedings against him will, after October 11, 1960, have been mooted. After that date, petitioner either will have violated the Subcommittee's clear demand that he turn over the letters of transmittal thereby rendering himself liable to citation for contempt, or have complied with the Subcommittee's entire directive thereby relinquishing his claimed constitutional rights. In either event, the novel question of the justiciability of such an "order" prior to his becoming liable to citation for contempt will be out of the case.

Judge Prettyman, in a separate statement below, held this question non-justiciable, relying on *Mins* v. *McCarthy* (C.A.D.C.), 209 F. 2d 307.[3] While we might agree that

[3] The court below entered a *per curiam* order. In a separate statement of views, Judge Prettyman cited, in addition to the *Mins* case, *Fishler* v. *McCarthy* (D.C. SDNY), 117 F. Supp. 643, aff'd 218 F. 2d 164 (Pet. App. 24).

where "a committee of the Congress has issued a subpoena *ad testificandum* to a witness, to appear at a hearing, without defining the questions to be asked, the judicial branch of the Government should not enjoin in advance the holding of the hearing or suspend the subpoena" (*ibid*), that is not this case.[6] Here, petitioner has appeared; he has answered all questions; he is challenging a specific order made by respondent Dodd on behalf of the Subcommittee, expressly stated and clearly defined. In this case, the order is "definite and concrete." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). In our view, the validity of such an *order* can be determined now, and in this proceeding. Cf. *Eccrs v. Dwyer*, 358 U.S. 202 (1958); *Shields v. Utah, Idaho Central RR Co.*, 305 U.S. 177, 183 (1938); *Hines v. Grimes Packing Co.*, 337 U.S. 86, 98-99 (1949); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 154-156 (1951).

This Court has held that the "good faith" of the witness does not constitute a defense to a prosecution for contempt of Congress. *Sinclair v. United States*, 279 U.S. 263, 299 (1929); *Watkins v. United States*, 354 U.S. 178, 208 (1957). Yet, to our knowledge, it has never had occasion before now to decide whether and under what circumstances a witness can challenge in the district court the validity of an order *duces tecum* of a congressional committee *prior* to being cited for contempt.[7] The cases presently on this Court's docket involving claimed invasions by congressional committees of witnesses' First, Fourth and Fifth Amendment rights all arise from convictions for contempt of Congress under 2 U.S.C. § 192.[8] Unless

[6] In *Hearst v. Black* (C.A.D.C.), 87 F. 2d 68, the court below indicated that the equity jurisdiction of the district court could be invoked to restrain action by a congressional committee in excess of its authority in a proper case. *Id.*, at p. 71.

[7] Cf. *Jones v. SEC*, 298 U.S. 1, 26-28 (1936).

certiorari is granted, this Court, by allowing the procedural issue here involved to become moot, will have made the price of a witness' assertion of his constitutional rights before congressional committees the gauntlet of indictment, trial, conviction and appeal. In our view, this is too high a cost for the exercise today of rights *guaranteed* as long ago as December 15, 1791. Cf. *Brownell* v. *Tom We Shung*, 352 U.S. 180, 183 (1956).[8]

II

Petitioner objected to the Committee's order requiring him to disclose the identities of the circulators of his petition to the United Nations since it would expose these persons to reprisal and inhibit the circulation of his and like petitions seeking action within the United Nations on the problem of survival in a nuclear age. Presumably, the Committee was looking for Communists. But there was no showing or even a claim by the Committee that a single circulator of Dr. Pauling's petition was a Communist or was associated with Communism. Was the Committee's order *duces tecum* an "indiscriminate dragnet procedure lacking in probable cause" (*Barenblatt* v. *United States*, 360 U.S. 109, 134 (1959)) in violation of the First and Fourth Amendments? Was it related to any valid legislative purpose?[9]

The importance of granting certiorari to decide these questions *now*, rather than *later*—after petitioner has been

---

[8] In its report on the Declaratory Judgment Act of 1934, the Senate Judiciary Committee pointed out that the declaratory judgment "has been especially useful [in situations], now so often present, of having to act at one's peril or to act on one's interpretation of his rights, or abandoning one's rights because of a fear of incurring damage." *Sen. Rep. No. 1005*, 73d Cong., 2d Sess. 2 (1934).

[9] We think not. *See Sweezy* v. *New Hampshire*, 354 U.S. 234, 248, 250-251, 254, 265-267 (1957).

cited, indicted, tried and convicted—is inherent in the inhibitory effects flowing from the Committee's order. In *Talley* v. *California*, 362 U.S. 60 (1960), this Court said that the anonymous distribution of handbills "played an important role in the progress of mankind." *Id.*, at p. 64. In that case a California ordinance prohibiting the distribution of handbills if the identity of the distributor was not disclosed was held invalid *on its face*. In this case the anonymous distribution of Dr. Pauling's petition (and like communications) may play an "important role in the [survival] of mankind."

The Committee's order is not merely invalid because if petitioner complied with it "identification and fear of reprisal might deter perfectly peaceful discussion of public matters of importance" (*Talley* v. *California*, 362 U.S. 60, 65);[10] the Committee's order is invalid because it serves to put other scientists on notice that should they believe it important enough to initiate petitions to the United Nations expressing concern on the most important question of our time, they too will become subject to interrogation by the Senate Subcommittee on Internal Security. In *Watkins* v. *United States*, 354 U.S. 178 (1957), this Court recognized that the prospect of being subpoenaed before a congressional committee and subjected to interrogation, in view of the resulting publicity attending the witness' appearance, might be enough to inhibit full and free discussion of controversial issues. *Id.*, at pp. 197-198.

Whether or not there should be a resumption of nuclear weapons testing; or whether there should be an international agreement prohibiting further nuclear contamina-

[10] On a "balancing theory" (*Barenblatt* v. *United States*, 360 U.S. 109, 126) and in view of the allegations of reprisal and harassment, which are conceded inasmuch as the complaint was dismissed, the Committee's action cannot be justified. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 462 (1958); *Bates* v. *Little Rock*, 361 U.S. 516 (1960).

tion are issues which currently demand more discussion, not less. Cf. *Pauling* v. *McElroy* (C.A.D.C.), 278 F. 2d 252, 255. If, because of judicial abstention *now*, a world-wide scientists' protest should be inhibited, and nuclear testing should be resumed, the effects of radiation pollution on the world's atmosphere might prove disastrous. As a result of the Committee's order, public discussion by scientists on matters as important as nuclear contamination and disarmament may be frustrated. For this reason, we say that judicial review *later* of the questions raised by petitioner *now* may be judicial review too late.

CONCLUSION.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

David I. Shapiro
1411 K Street, N. W.
Washington 5, D. C.

Lawrence Speiser
1612 I Street, N. W.
Washington 5, D. C.
Attorneys for the
American Civil Liberties Union;
Amicus Curiae

Melvin Warshaw
20 East 46th Street
New York 17, New York
Of Counsel

FILE COPY

FILED
SEP [illegible] 1960
JAMES R. BROWNING, Clerk

No. 419

In the Supreme Court of the United States

OCTOBER TERM, 1960

LINUS PAULING, PETITIONER

v.

[illegible]OUS O. EASTLAND, THOMAS J. DODD, OLIVER GASCH AND JOSEPH C. DUKE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
JOHN G. LAUGHLIN, JR.,
Attorney,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	15
Appendix	17

CITATIONS

Cases

Aetna Life Ins. Co. v. *Haworth*, 300 U.S. 227	7
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	8
Barenblatt v. *United States*, 360 U.S. 109	13, 14
Brownell v. *Tom We Shung*, 352 U.S. 180	9
Evers v. *Dwyer*, 358 U.S. 202	9
Eccles v. *Peoples Bank*, 333 U.S. 426	9, 11, 12
Emspak v. *United States*, 349 U.S. 190	14
Federation of Labor v. *McAdory*, 325 U.S. 450	8, 9, 12
Fischler v. *McCarthy*, 117 F. Supp. 643, affirmed, 218 F. 2d 164	10
Hearst v. *Black*, 87 F. 2d 68	10, 11
Kerotest Mfg. Co. v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180	9
LaCrosse Tel. Corp. v. *Wis. Board*, 336 U.S. 18	9
Local 107 v. *McClellan, et al.*, No. 629, Oct. Term, 1958, certiorari denied, 358 U.S. 947	11
McCloud v. *Louisville & Nashville R'd Co.*, 183 U.S. 483	10
McGrain v. *Daugherty*, 273 U.S. 135	14
McGrath v. *Kristensen*, 340 U.S. 162	9

Cases—Continued

	Page
Methodist Federation for Social Action v. *Eastland*, 141 F. Supp. 729	10
Mins v. *McCarthy*, 209 F. 2d 307	11
Public Serv. Comm'n v. *Wycoff, Co.* 344 U.S. 237	8, 9, 10, 11, 12
Quinn v. *United States*, 349 U.S. 155	14
Raley v. *Ohio*, 360 U.S. 423	13
Santa Fe Pacific R. R. Co. v. *Lane*, 244 U.S. 492	9
Sinclair v. *United States*, 279 U.S. 263	13, 14
Spielman Motor Sales Co. v. *Dodge*, 295 U.S. 89	14
Skelly Oil Co. v. *Phillips Co.*, 339 U.S. 667	7, 8
Trimble v. *Johnston*, 173 F. Supp. 651	10
United Public Workers v. *Mitchell*, 330 U.S. 75	8
United States v. *Rumely*, 345 U.S. 41	12, 14
United States v. *Woodbury*, 263 F. 2d 784	13
Watkins v. *United States*, 354 U.S. 178	14

Constitution and statutes:

United States Constitution, First and Fourth Amendments	12
Declaratory Judgment Act, Sec. 1, 62 Stat. 964, 28 U.S.C. 2201	2, 7
2 U.S.C. 192	6, 13, 14
2 U.S.C. 194	13

Miscellaneous:

Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, United States Senate, 86th Cong., 2d Sess., *Testimony of Dr. Linus Pauling*, June 21, 1960, Part 2	34
S. Res. 242, 86th Cong., 2d Sess.	12
S. Res. 366, 81st Cong., 2d Sess.	12

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 419

LINUS PAULING, PETITIONER

v.

JAMES O. EASTLAND, THOMAS J. DODD, OLIVER GASCH AND JOSEPH C. DUKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court did not file a written opinion. In the *per curiam* order of the Court of Appeals of September 6, 1960, affirming the judgment of the District Court (Pet. App. 1a), Chief Judge Prettyman and Judges Bazelon and Bastian each reserved the right to file a statement of his views. Chief Judge Prettyman, on September 7, filed a memorandum statement of his views, not yet reported, which appears in Pet. App. 2a–8a. In a *per curiam* order filed September 14 (App., *infra*, p. 17), Judges Bazelon and Bastian decided not to file separate statements of their views. Judge Bastian, however,

concurred in the statement of Judge Prettyman and Judge Bazelon concurred in the result effected by the court's order of September 6.

JURISDICTION

The *per curiam* order of the Court of Appeals (Pet. App. 1a) was entered on September 6, 1960. The petition for a writ of certiorari was filed on September 16, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court was correct in dismissing petitioner's complaint for a declaratory judgment seeking a determination that an order on behalf of the Senate Subcommittee on Internal Security is unlawful and void.

2. Whether on the facts alleged in the complaint petitioner's suit for injunctive relief against the United States Attorney and the Senate Sergeant-at-Arms was properly dismissed.

STATUTE INVOLVED

Section 1 of the Declaratory Judgment Act, 62 Stat. 964, 28 U.S.C. 2201, provides as follows:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

On June 18, 1960, petitioner was served with a subpoena directing that he appear on June 20 before a Subcommittee of the Committee on the Judiciary, United States Senate, To Investigate the Administration of the Internal Security Act and Other Internal Security Laws. The subpoena was signed by Senator James O. Eastland, Chairman of the Committee and Subcommittee, and was served by Joseph C. Duke, Sergeant-at-Arms, United States Senate. On June 20, 1960, petitioner appeared as ordered, and the hearing was continued to June 21, 1960. Petitioner appeared on June 21 before the Subcommittee. The hearings of that date were presided over by Senator Thomas J. Dodd, Vice Chairman,[1] who, at the close of the hearing, "on behalf of the Senate Internal Security Subcommittee of the Judiciary Committee of the Senate of the United States," ordered and directed petitioner as follows:[2]

> * * * to appear * * * [before the Subcommittee] and to bring with you all signatures or purported signatures to the petition presented

[1] In addition to Senator Eastland, Chairman, and Senator Dodd, Vice Chairman, the Subcommittee includes Senators Johnston, McClellan, Ervin, Hruska, Dirksen, Keating and Cotton.

[2] The quotations are from p. 30 of the galley proofs of the Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, United States Senate, 86th Cong., 2d Sess., *Testimony of Dr. Linus Pauling*, June 21, 1960, Part 2. The transcript of the June 21 hearing is incorporated by reference in Paragraph IV of petitioner's complaint and a galley proof of the transcript is included as a part of the record in this Court.

> by you to the Secretary General of the United Nations on January 15, 1958, together with all letters of transmittal by which, or in connection with which, such signatures were transmitted to you or received by you.[3]

Petitioner's reappearance was originally set for August 9, 1960, was subsequently reset for September 15, 1960, and is now scheduled for October 11, 1960.[4] The petition to the United Nations, referred to by Senator Dodd, was prepared by Dr. Pauling, contains the signatures of over 11,000 scientists from 49 countries, and urges "an international agreement to stop further testing of nuclear bombs by all the countries of the world engaging in such testing."[5]

On August 4, 1960, petitioner commenced this suit against the Chairman and Vice Chairman of the Subcommittee, the Senate Sergeant-at-Arms, and the United States Attorney for the District of Columbia. As to Senator Dodd, the complaint seeks (1) a declaratory judgment and decree "declaring his [petitioner's] rights and duties in connection with, arising out of, and pertaining to" the order and direction by Senator Dodd on June 21; (2) a judgment declaring the order of June 21 "to be null and void and of

---

[3] At the June 21, 1960, hearing before the Subcommittee, Dr. Pauling agreed to conform to the Subcommittee's request to furnish the names of people to whom he sent a letter requesting the circulation of the petition to the United Nations. He declined, however, to conform to the request for the names of individuals who transmitted to him papers bearing one or more signatures to the petition. Galley proof, pp. 23–25.

[4] On September 8, 1960, by letter from Senator Dodd to petitioner's counsel, petitioner's appearance before the Subcommittee was postponed from September 15 to October 11, 1960.

[5] Complaint, ¶ IV.

no legal force or effect and violative of the rights of the [petitioner] guaranteed by the First and Fourth Amendments * * *." The order, it is alleged, deprives petitioner of freedom of conscience, freedom of speech, freedom of the press, freedom of assembly and constitutes an unreasonable search and seizure of petitioner's papers and effects. The complaint further alleges that the papers that are the subject of the order are not pertinent to any lawful inquiry of the Subcommittee.[6] The complaint states that there is a controversy between petitioner and Senator Dodd as to the legality of the order and an "identical controversy" obtains between petitioner and Senator Eastland and the Senate Sergeant-at-Arms, as agents for the Subcommittee. A controversy is also said to exist between petitioner and Senators Eastland and Dodd and the Sergeant-at-Arms as to petitioner's rights and duties pertaining to, and arising out of, the order.[7]

As it pertains to the United States Attorney for the District of Columbia, the complaint alleges that, in the event of noncompliance by petitioner with the June 21

[6] In paragraph VII of the complaint, the petitioner states that he is willing to comply with a portion of the June 21 order, namely, to submit the signatures to the United Nations petition of residents of the United States. With respect to signatories from other countries, the complaint alleges that the Subcommittee exceeded its jurisdiction and asks for a judicial ruling as to whether petitioner is lawfully required to submit these signatures. By letter of September 1 to the Court of Appeals and following oral argument on petitioner's appeal, petitioner formally withdrew the claim set out in paragraph VII "and that issue is eliminated from the case."

[7] Complaint, ¶ IX.

directive, the United States Attorney will file an information charging petitioner with the commission of a criminal offense; and in the alternative will submit the matter to a grand jury for indictment under the provisions of 2 U.S.C. 192. Petitioner asks for an injunction restraining the United States Attorney from enforcing the June 21 order and/or prosecuting petitioner for any alleged crime for refusal to comply with the order.[5]

On respondents' motion, the District Court dismissed the complaint. In its oral remarks, the court said (Tr. 40–41):

> I am of the opinion that the challenged order is not subject to a judicial review in this proceeding. I am further of the opinion that the plaintiff here has a plain, adequate and complete remedy at law in the event of any proceedings against him. And I am further of the opinion that the relief sought in the complaint would require an unauthorized interference with the legislative branch of the Government * * *.

An order of dismissal was entered on August 23, 1960, and a notice of appeal was filed on the same date. A motion for stay pending appeal and a motion to submit petitioner's appeal on the merits were filed with the Court of Appeals; the motion and appeal, with respondents' consent, were argued and submitted on September 1. On September 6, the Court of Appeals (Chief Judge Prettyman, Judges Bazelon and Bastian), *per curiam*, ordered that the motion for a stay be denied and that the judgment of the District Court

[5] Complaint, ¶¶ X, XI.

be affirmed. In the court's order, each judge reserved the right to file a statement as to his views. Chief Judge Prettyman's views, later concurred in by Judge Bastian, appear in a statement filed on September 7 (Pet. App. 2a–8a). In sum, Chief Judge Prettyman states that the courts have no power in the present proceeding to pass, either by injunction or declaratory judgment, upon the validity of the Subcommittee order. Judge Bazelon concurs in the result effected by the court's order of September 6, 1960 (App., *infra*, p. 17).

ARGUMENT

1. The complaint filed in this case is an unprecedented attempt to require the courts of the United States, in advance of any immediate deprivation of rights or liberty or any immediate threat of deprivation, to declare the legal rights and obligations of petitioner with respect to an order to appear issued by a Congressional subcommittee, but not yet implemented or sought to be implemented in any way. There are, of course, fundamental obstacles which stand in the way of a federal court's entertaining such a suit or granting the relief which petitioner seeks.

(*a*) Petitioner invokes (Pet. 11–13) the Declaratory Judgment Act, 22 U.S.C. 2201, *supra*, p. 2, as authority for an award of relief to him. The Declaratory Judgment Act, however, is procedural only,[9] not a grant of jurisdiction, and the remedy which it affords is available only where an "actual controversy," in a constitutional sense, is presented.[10] And "[t]he

[9] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240.

[10] *Ibid.*; see, also, *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 671–672.

requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit."[11] Judged by these tenets, the dismissal of petitioner's complaint was clearly correct.

Though the complaint ends by alleging the existence of a controversy,[12] the facts set out in the preceding allegations of the complaint make it plain that at this point in time there is no justiciable controversy before the Court. The Subcommittee's order to which the complaint is addressed requires only that petitioner, on his reappearance, bring with him certain documentary data (*supra*, pp. 3–4). The date for complying with the Subcommittee order has not yet arrived and an order to turn the documentary data over to the Subcommittee has not yet been issued. Petitioner anticipates such an order but until it issues it cannot be said that the Subcommittee has rejected his legal and non-legal objections to submitting the data to the Subcommittee. Moreover, the petitioner has not been cited by the Senate for contempt, nor has the United States Attorney been asked to prosecute. There is, in short, no present deprivation or denial of asserted constitutional rights; there is no detention and no present basis for any threat of detention, or even threat of prosecution. At this time the questions posed by the complaint arise wholly in the abstract—

---

[11] *Federation of Labor* v. *McAdory*, 325 U.S. 450, 461; see also, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 325; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90–91; *Skelly Oil Co.* v. *Phillips Co.*, 339 U.S. 667, 672–673; *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 242–243.

[12] Complaint, ¶ IX.

on petitioner's own hypothesis of what the course of events will be—and a judicial declaration at this stage would be purely of an advisory nature. In such circumstances, it cannot be said that a controversy exists such as might bring this case within the constitutional and statutory bounds of judicial power. See the cases cited, *supra*, pp. 7, 8, fns. 9, 11.[13]

(*b*) Jurisdictional considerations aside, the remedy made available by the Declaratory Judgment Act confers a discretion on the courts rather than an absolute right upon the litigant." " * * * [T]he propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power * * *." *Pub-*

[13] The cases cited by petitioner (Pet. 12–13) are not to the contrary. In *Evers* v. *Dwyer*, 358 U.S. 202, an existing deprivation of constitutional rights was alleged and the record disclosed that enforcement of the allegedly unconstitutional statute would be continued. 358 U.S. at 203–204. In *McGrath* v. *Kristensen*, 340 U.S. 162, there was an existing dispute over the right of an alien to be considered for suspension of deportation. In *Brownell* v. *Tom We Shung*, 352 U.S. 180, the question was whether, procedurally, an alien exclusion order could be reviewed exclusively in a habeas corpus proceeding. The question of whether an "actual controversy" was present was not involved; such an existing controversy was conceded. Nor was such a question involved in *Santa Fe Pacific R.R. Co.* v. *Lane*, 244 U.S. 492. And in *LaCrosse Tel. Corp.* v. *Wis. Board*, 336 U.S. 18, the Court was concerned with the finality of a state court judgment for purposes of its review.

[14] *Federation of Labor* v. *McAdory*, 325 U.S. 450, 471; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431; *Kevoest Mfg. Co.* v. *C-O Two Fire Equip. Co.*, 342 U.S. 180, 183–184; *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 241.

lic Serv. Comm'n v. *Wycoff Co.*, 344 U.S. 237, 243. Considered as a candidate for the exercise of judicial discretion, petitioner's complaint for declaratory relief was properly dismissed.

Though no injunctive relief against Senators Eastland and Dodd is asked, the declaratory decree which petitioner seeks nonetheless calls for a novel and substantial inroad upon the fundamental constitutional doctrine of separation of powers. As stated by Chief Judge Prettyman (Pet. App. 7a):

> * * *. It is unthinkable to me that, if the Courts should hold a specific directive of a Committee of the Congress unconstitutional and void, the Committee would nevertheless attempt to enforce that directive. So, as I view it, a declaratory judgment would be as effective an impingement upon and interference with legislative proceedings as a flat injunction would be. Thus I think that a declaratory judgment respecting the validity of contemplated Congressional action would violate the doctrine of the separation of powers and would be an illegal impingement by the judicial branch upon the duties of the legislative branch.

An unbroken line of authority confirms that legislative action cannot be interfered with by injunction or mandamus. *McChord* v. *Louisville & Nashville R'd Co.*, 183 U.S. 483, 495; *Hearst* v. *Black*, 87 F. 2d 68 (C.A.D.C.); *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729, three-judge court (D.D.C.); *Fischler* v. *McCarthy*, 117 F. Supp. 643 (S.D.N.Y.), affirmed, 218 F. 2d 164 (C.A. 2); *Trimble* v. *Johnston*, 173 F. Supp. 651 (D.D.C.);

Mins v. *McCarthy*, 209 F. 2d 307 (C.A.D.C.); see also, *Local 107* v. *McClellan, et al.*, No. 629, Oct. Term 1958, certiorari denied, 358 U.S. 947.

The compelling considerations underlying the judicial restraint which has been exercised in injunctive suits against the Congress [15] are even more pertinent here where the essentially equitable remedy of a declaratory judgment [16] is invoked as a vehicle for an unprecedented incursion upon the legislative domain. "A maximum of caution is necessary * * * where a ruling is sought that would reach far beyond the particular case." *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 243. If the declaratory remedy were to be held to extend to the present situation, then it would appear that the courts should be prepared to assume a general superintendence and

---

[15] "* * * The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference.

"The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. * * *." *Hearst* v. *Black*, 87 F. 2d 68, 71–72 (C.A.D.C.).

[16] *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431.

power of pre-audit over the inquiries of Congressional committees. Actual or potential witnesses will be free to resort, in advance, to the courts to test what questions they should answer and what documents they should produce. We need not spell out the drastic and novel impact of such judicial interventions on the processes of legislative inquiry.

(*c*) Furthermore, the nature of the questions which this complaint poses for judicial decision is such as would of itself warrant denying the declaratory remedy which petitioner seeks. Apart from the question of the authority of the Subcommittee to make the demand which it has made upon petitioner,[17] the complaint raises constitutional questions under the First and Fourth Amendments. The decisions of this Court, however, uniformly teach that it is in the public interest to avoid possibly needless determinations of constitutional questions.[18] And the force of this doctrine of judicial restraint is worthy of particular emphasis where, as here, the disagreement has not as yet "taken on fixed and final shape,"[19] and may never do so. Cf. *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431–432.

(*d*) If the convenience or private interest of petitioner were the sole consideration (see Pet. 10–13) in determining whether to grant or withhold

---

[17] See S. Res. 366, 81st Cong., 2d Sess.; S. Res. 242, 86th Cong., 2d Sess.

[18] *E.g.*, *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 243; *Federation of Labor* v. *McAdory*, 325 U.S. 450, 471; see also, *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431; cf. *United States* v. *Rumely*, 345 U.S. 41, 43, 46.

[19] *Public Serv. Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 244.

the declaratory remedy at this stage, a case for granting the remedy could perhaps be made. But considerably more than his private interest or convenience is at stake. Involved in his claim for judicial help at this time are principles of separation of powers, of the limits and restrictions on judicial action, of wise discretion in the use of an equitable remedy, and of the constitutional requirements of federal adjudication. All these weigh heavily against the judicial intervention petitioner seeks.

If to deny the remedy and to remit petitioner to his private counsel puts a burden upon him and places him on a path he regards as perilous, his burden and peril are no greater than many others have borne when faced with a dilemma similar to his. Instances abound when a citizen, without benefit of judicial advice, must conscientiously make elections as to whether a particular course of conduct is to be pursued.[20] In due course and at a proper time, the power of the judiciary may become available to test the legality of a decision—as the past and pending cases in this Court, to which petitioner refers, attest (Pet. 5–6). If the Subcommittee demands the data from petitioner, if petitioner persists in his stated refusal to submit the data to the Subcommittee, if his refusal results in a contempt citation by the Senate, and if he is detained by the Senate, or if contempt proceedings are initiated under 2 U.S.C. 192, 194, then and only then may the courts

[20] *E.g.*, *Raley* v. *Ohio*, 360 U.S. 423, 442; *Barenblatt* v. *United States*, 360 U.S. 109, 138–139 (dissenting opinion); *Sinclair* v. *United States*, 279 U.S. 263, 299; cf. *United States* v. *Woodbury*, 263 F. 2d 784, 787–788 (C.A. 9).

properly pass upon the authority of the Subcommittee and upon petitioner's constitutional objections to the existing and anticipated demand of the Subcommittee. Cf. *United States* v. *Rumely*, 345 U.S. 41; *Watkins* v. *United States*, 354 U.S. 178; *Barenblatt* v. *United States*, 360 U.S. 109; *Quinn* v. *United States*, 349 U.S. 155; *Emspak* v. *United States*, 349 U.S. 190; *McGrain* v. *Daugherty*, 273 U.S. 135; *Sinclair* v. *United States*, 279 U.S. 263.[11]

2. "With respect to the respondents Joseph C. Duke and Oliver Gasch, the petitioner seeks [injunctive] relief against them, only in the event that the Court should determine that it has no jurisdiction to grant the relief prayed for against the respondent Thomas J. Dodd * * *" (Pet. 19). The considerations militating against entertaining the complaint for declaratory relief apply with equal force to the injunctive feature of this suit. There is no presently existing "case or controversy" as to the United States Attorney and the Senate Sergeant-at-Arms; and there is no present threat of criminal prosecution or of detention by the Senate and no immediate basis for either. In these circumstances there is no ground whatever for equitable intervention and it is entirely beside the point that in exceptional circumstances threatened criminal persecutions may be the subject of injunction. Cf. *Spielman Motor Sales Co.* v. *Dodge*, 295 U.S. 89, 95.

[11] It may be that the role of the courts will differ, depending upon whether Congress punishes contempt through its own processes or whether resort is had to 2 U.S.C. 192 (see *Watkins* v. *United States*, *supra*, at 216, Frankfurter, J., concurring). In the present case, of course, it is not known what route would be followed if the Senate did proceed against petitioner.

CONCLUSION

The dismissal of petitioner's complaint was clearly correct and in accord with established principles; there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

JOHN G. LAUGHLIN, JR.,
Attorney.

SEPTEMBER 1960.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

No. 15,963

LINUS PAULING, APPELLANT *v.* JAMES O. EASTLAND, ET AL., APPELLEES

Before: PRETTYMAN, *Chief Judge,* and BAZELON and BASTIAN, *Circuit Judges,* in Chambers.

ORDER

Circuit Judges Bazelon and Bastian having decided not to file separate statements as to their views with respect to the action of the court September 6, 1960, denying a stay and affirming the judgment of the District Court in this case, it is

ORDERED by the court that the following paragraphs be added to the statement of Chief Judge Prettyman filed herein September 7, 1960:

Circuit Judge Bastian concurs in the foregoing statement.

Circuit Judge Bazelon concurs in the result.

Per Curiam.

Dated: September 14, 1960.

U. S. GOVERNMENT PRINTING OFFICE 1960

IN THE

Supreme Court of the United States

October Term, 1960

No. 419

LINUS PAULING,

Petitioner,

vs.

JAMES O. EASTLAND, THOMAS J. DODD, OLIVER GASCH and JOSEPH C. DUKE,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION.

The fact, if it be a fact (Br. in Opp. 7), that this is an unprecedented case, rather than arguing against the granting of certiorari by this Court is a precise and cogent reason why hearing should be granted. It cannot be gainsaid that the question is important, nor do respondents attempt to do so.

But the argument being pressed by petitioner is not really unprecedented nor is it without judicial approval. In *Hearst v. Black*, 87 F. 2d 68, 71 (C. A. D. C. 1936), it was clearly recognized that if judicial assistance had been asked for *before* the order had been executed, appropriate injunctive relief would have been granted.

(a) Petitioner, of course, mightily takes issue with respondents' view (Br. in Opp. 8) that there is no justiciable controversy before the Court.

Thus, respondents say (*ibid*): "An order to turn the documentary data over to the Subcommittee has not yet been issued." This is a most tenuous and refined, indeed perhaps even a semantic, view of the facts. Petitioner was ordered and directed (Galley Proof, p. 30):

> "to appear . . . and to bring with you all signatures or purported signatures to the petition presented by you to the Secretary General of the United Nations on January 15, 1958, together with all letters of transmittal by which, or in connection with which, such signatures were transmitted to you or received by you."

The very purpose of this order was for petitioner to bring to the committee the letters of transmittal[1] to be exhibited to the committee—so the committee could see them. Whether the letters are to be "turned over" to the committee is beside the point. It is the disclosure which is in issue here. This is the thing against which petitioner seeks and is entitled to judicial relief.

In *Santa Fe Pacific R.R. Co. v. Lane*, 244 U. S. 492, 498, where the Secretary of the Interior had merely made a "demand" (not even an order or direction, as here) upon plaintiff, this Court said:

> "The plaintiff was not required, in order to test the validity of the demand, . . . to rely entirely upon defending such suit as might be brought by the Attorney General. On the contrary, if the

[1]The signatures are not in issue here.

> demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity . . . The hazards and embarrassment incident to any such course were such as to entitle it to act promptly and affirmatively . . ."

Accordingly, respondents are quite in error when they say (Br. in Opp. 8): "At this time the questions posed by the complaint arise wholly in the abstract." The questions here are definite and concrete. A definitive *order has been made*. Is it or is it not valid?

Respondents are clearly in error when they say (Br. in Opp. 8) that the committee has not yet rejected petitioner's legal and non legal objections. The transcript (Galley proof, pp. 23-30) discloses that at some length petitioner explained his reasons for advising the committee that he would not comply with the request (*e.g.* Galley Proof, pp. 24-25, 27), that his counsel made the legal objections (Galley Proof, p. 35), that the committee members sought to dissuade petitioner and explained the reasons why the committee could not accept petitioner's position (Galley Proof, pp. 28-29), all of which was culminated by the committee's order, through the Chairman, here in question.

Accordingly, the "administrative remedies", so to speak, have been exhausted.

(b) That declaratory relief is a discretionary remedy and that the courts below ruled against petitioner, does not end the matter. The discretion given the courts is the right to exercise a sound, judicial discretion, not an arbitrary one. The discretion must be "reasonably

exercised." (*Sani-Top, Inc. v. North American Aviation*, 261 F. 2d 342, 349 (C. A. 9, 1958).)

One of the very reasons for, and uses of, the declaratory judgment procedure, is to provide a remedy to a suitor who cannot otherwise have his question adjudicated until his adversary takes the initiative (*Employers Liability Assur. Corp. v. Ryan*, 109 F. 2d 690, 691 (C. C. A. 6, 1940)). Respondents base their position that this is not a proper case for relief to be granted on the erroneous concept, articulated by the court below (Br. in Opp. 10; Pet. App. 7a) that what is sought here is "a declaratory judgment respecting the validity of *contemplated* Congressional action." (Italics added.) But such is simply not the case. The Congressional action here attacked is not contemplated: it has already occurred. It is the validity of *that* action—that order—which is involved here.[2]

Respondents express concern (Br. in Opp. 10-11) that what is sought here is a ruling that would reach beyond this particular case and establish a principle of judicial "superintendence and power of pre-audit over the inquiries of Congressional committees." Respond-

---

[2]Accordingly, respondents' quotation (Br. in Opp. 11, n. 15) from *Hearst v. Black*, 87 F. 2d 68, 71-72, is inapposite. More to the point from the *Hearst* case is the court's recognition (87 F. 2d at 71) that "if the bill had been filed while the trespass was in process (i.e. before the order had been effectuated) it would have been the duty of the lower court by order on the commission or the telegraph companies or the agent of the committee *to enjoin the acts complained of*." (Parentheses and italics added.)

ents thus set up a straw man not justified by the facts of this case and then proceed to knock it down.

The cases conjured up by respondents (Br. in Opp. 12) are simply not the case at bar. The Court is being asked merely to hear and determine the facts of *this* case, a case involving an actual, precise and concrete order which the committee has already made *after* hearing and overruling petitioner's objections thereto.

(c) That constitutional questions are involved in this case (Br. in Opp. 12) does not mean that this Court should not hear the case. Indeed it "is of the very essence of (the) judicial duty" of this Court to decide constitutional questions. (*Marbury v. Madison*, 1 Cranch, 137, 178.)[3]

Respondents' position is based upon the same erroneous view of the facts that (Br. in Opp. 12): "the disagreement has not as yet 'taken on fixed and final shape.'" As we have attempted to point out, this is simply not the case. Presented here is a concrete situation, ripe for adjudication.

(d) That, as respondents show (Br. in Opp. 13-14), another remedy may be available to petitioner to test the validity of the committee's action, *after* petitioner has been required "to determine whether the suspect is a mushroom or a toadstool" by eating it

---

[3] *Cf.* Mr. Justice Jackson, dissenting, in *Eisler v. United States*, 338 U. S. 189, 196: "I do not think we can run away from the case just because Eisler has."

(Borchard, *Declaratory Judgments*, 2d Ed., 278), is no ground for denying relief now. The Declaratory Relief Act itself (28 U. S. C. 2201) and Rule 57, Federal Rules of Civil Procedure, provide just to the contrary.

The case falls directly within this Court's Rule 19(1)(b), 3d phrase: the court below "has decided an important question of federal law which has not been, but should be, settled by this court."

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioners